IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1332 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.THAKKAR

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1. Whether Reporters of Local Papers may be allowed to see the judgement?-Yes. : YES

2. To be referred to the Reporter or not?-No. :

3. Whether Their Lordships wish to see the fair copy of the judgement?-No. : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?-No. : NO

5. Whether it is to be circulated to the Civil Judge?-No. :

BOMBAY MERCANTILE COOPERATIVE BANK LTD

Versus

NAGINDAS A NAGAR

Appearance:

MR BG JANI for Petitioner

MR GIRISH D BHATT for Respondent No. 1

NOTICE UNSERVED for Respondent No. 2

SERVED BY RPAD - (N) for Respondent Nos. 3 to 6

MR ASHISH H SHAH for Respondent No. 7

CORAM : MR.JUSTICE C.K.THAKKAR

Date of decision: 01/05/2000

ORAL JUDGEMENT

This petition is filed by the Petitioner-Bank for quashing and setting aside the judgment and order passed by the Gujarat Cooperative Tribunal, Ahmedabad in Appeal

No.24 of 1996 on September 25, 1998, reversing the order passed by the Board of Nominees in Lavad Suit No.2080 of 1990 on November 24, 1995.

The case of the petitioner was that it is a Cooperative Bank constituted under the provisions of the Gujarat Cooperative Societies Act, 1961 (hereinafter referred to as "the Act"). That Messrs. Kailashchandra Jivraj & Co., a partnership firm, wanted overdraft facility to the extent of Rs.2,00,000/- and for the said purpose, an application was made to the petitioner-Bank, duly signed by the applicants as well as two guarantors Nagindas A. Nagar, respondent No.1 herein, and Jayshanker Bhikhaji Purohit. It was the case of the petitioner-Bank that for the said purpose, necessary documents were executed by the parties and overdraft facility was extended in favour of opponent Nos.2 to 5. According to the petitioner, as there was default on the part of the debtor and the amount was not paid either by the debtor or by the guarantors, Lavad Suit No.2080 of 1990 was filed in the Court of Board of Nominee for the recovery of Rs.2,13,913.42 Ps. against all the opponents, holding them jointly and severally liable.

The Board of Nominee, however, after appreciating the facts and circumstances and relying on the materials placed on record, observed that defendant No.7 before the Board of Nominee (Jayshanker Bhikhaji Purohit) had not signed the deed of guarantee. The said fact was admitted by a witness of the Bank and accordingly, he cannot be held liable. Regarding other defendants, however, the Board of Nominee was of the view that from the documentary evidence, the case of the Bank against them was proved and accordingly, an Award was passed against defendant Nos. 1 to 5, and defendant No.6 guarantor, for an amount of Rs.2,13,913.42 Ps., along with interest at the rate of 21% per annum and also an amount of Rs.1,000/towards costs.

It may be noted at this stage that against discharge of defendant No.7, one of the guarantors, no appeal was preferred before the Tribunal by the Bank. Two appeals were instituted before the Gujarat Cooperative Tribunal, one by the original debtor, being Appeal No.60 of 1997, and another, from which the present petition has arisen, was filed by Nagindas A. Nagar, one of the guarantors, being Appeal No.24 of 1996. The Tribunal, by a common judgment and order, disposed of both the appeals. So far as the appeal of debtor was concerned, it was allowed setting aside the Award passed by the Board of Nominee and remanding the matter to the

Board of Nominee, by directing it to extend opportunity of hearing to the debtor and to pass order afresh. The appeal filed by the guarantor was fully allowed and it was held that in view of the fact that there were two guarantors and one of them was held not liable, as he had not signed the deed of guarantee, in the light of the provisions of Section 144 of the Indian Contract Act, 1872, his liability also came to an end. The said order passed against the petitioner-Bank and in favour of one of the guarantors is challenged in the present petition.

I have heard Mr.B.G. Jani, learned counsel for the petitioner, Mr.Girish D. Bhatt, learned counsel for respondent No.1 and Mr.Ashish H.Shah, learned counsel for respondent No.7.

Mr.Jani submitted that the Tribunal has committed an error of law in holding that respondent No.1 herein is not liable to pay the dues of the petitioner-Bank. He submitted that the document was executed in accordance with law. Original application for grant of overdraft facility was signed by the debtor as well as both the guarantors and in pursuance thereof, overdraft facility was extended in favour of the debtor. He, no doubt, conceded that the deed of guarantee was not signed by both the guarantors but only by respondent No.1. Similarly, promissory note was also signed by one of the guarantors (respondent No.1 herein) alone, but that does not change the legal position. According to the learned counsel, once a contract was entered into between the parties, the liability of the parties thereto must be ascertained on the basis of such document and even if one of the guarantors was not liable, it would not, ipso facto, absolve the other guarantor and that was the view taken by the Board of Nominee, which was clearly legal and valid. By setting aside the said order and allowing the appeal, the Cooperative Tribunal has committed an error of law apparent on the face of the record, which requires to be quashed and set aside. He also drew the attention of the Court to Section 128 of the Contract Act and submitted that as stated in the said section, the liability of the surety is coextensive with that of the principal debtor "unless it is otherwise provided by the contract". Since there is no other provision in the deed itself, even if the contention of the second guarantor, which has been upheld by the Board of Nominee, is treated as final and in accordance with law, liability of present respondent No.1 does not come to an end and the petition deserves to be allowed.

On the other hand, Mr.G.D. Bhatt with Mr.Ashish

H. Shah supported the order passed by the Tribunal. He submitted that in the light of the facts and circumstances and materials placed on record, the Tribunal observed that the provisions of Section 144 of the Contract Act would apply and such an interpretation cannot be said to be contrary to or inconsistent with the Act and the order does not require interference. He also submitted that once it is held by the Board of Nominee that one of the guarantors was not liable, the only conclusion, which could have been arrived at by the Board of Nominee was that out of two guarantors, one stood discharged or relieved. In the light of the said finding, no conclusion could have been arrived at by the Board of Nominee that the other guarantor was liable as the contract cannot be said to have been entered into between the parties in accordance with law. It was also urged that the principle under Section 144, though statutory in nature and incorporated in the Contract Act, is based on equity and considering the underlying object of Section 144, the Tribunal allowed the appeal and rightly held that since the liability of one of the guarantors could not be said to have arisen, respondent No.1 herein was also entitled to discharge. My attention was also invited to the terms and conditions, which are part of the record and which were produced before the authorities below and it was submitted that even as per the terms and conditions, the order passed by the Tribunal cannot be said to be contrary to law.

In the facts and circumstances of the case, in my opinion, it cannot be said that the order passed by the Cooperative Tribunal can be said to be illegal, unlawful, contrary to law or deserves interference by this Court in exercise of powers under Article 226 / 227 of the Constitution. From the facts, it is clear that the original application was made by the debtor, along with two guarantors. On the basis of such application, overdraft facility was granted to the debtor. Terms and conditions, which have been placed before the authorities below and signed by the Branch Manger (Advances) make it clear that both the guarantors would be liable. Clause 7 of the Terms and Conditions reads as under :-

> " 7. The credit facility will be further secured by personal sureties of Mr.Nagindas A.Nagar and Jai Shanker Bhikhaji in their individual capacity, and they shall become the members (Shareholders) of our Bank and continue to be so, till the facility is repaid in full. "

In my opinion, in the light of the facts and circumstances and clause 7 of the Terms and Conditions, submission of learned counsel for respondent No.1 is well-founded that either both the guarantors are liable or none of them would be liable. Once it is conceded that one of the guarantors is not liable, it necessarily means that the other would not be liable. It is no doubt true that it was not the case of the Bank that the other guarantor was not liable, but on the basis of the record available and documents when the Board of Nominee held that one of them was not liable as he had not signed guarantee form and promissory note and that he stood discharged and the said finding has not been challenged by the petitioner-Bank and it has become final, it can be said that it is not now open to the petitioner-Bank to invoke Clause No.7 as per the Terms and Conditions, and the guarantor, who was ordered to be discharged, would not be held liable. If it is so, in my opinion, the Tribunal has not committed an error of law in invoking Section 144 of the Contract Act. Section 144 reads as under :-

> "144. Guarantee on contract that creditor shall not act on it until co-surety joins.Where a person gives a guarantee upon a contract that creditor shall not act upon it until another person has joined in it as co-surety, the guarantee is not valid if that other person does not join."

The Tribunal held, and, in my view rightly, that the creditor is not entitled to act on the agreement until the co-surety is joined, i.e. he is held liable. When he is not held liable and discharged from his liability as a guarantor, the Tribunal was right in holding that even present respondent No.1 also cannot be held liable.

In this connection, my attention was invited by the learned counsel to a decision of High Court of Madras in (Manem) Ayyanna v. Palavarti Veerabhadram, AIR 1926 Madras 62. In that case also, the Court was called upon to decide the ambit and scope of Section 144 of the Contract Act and the Court held that guarantee drawn up in the plural number but signed only by one surety is binding to that surety, who had signed it unless he shows that he was to be liable only if the other surety or sureties has signed. It is no doubt true that an agreement may be signed by one of them and unless he proves to the satisfaction of the authority that he would be liable only in case the other surety or sureties has

signed, his liability does not come to an end, but, in the instant case, it can be said that the 1st respondent has proved that he would not be liable if the document is not signed by co-surety. In this connection, the law has been stated in Halsbury's Laws of England thus :-

> " ... Where one surety expressly or impliedly stipulates that the other surety will also sign, it amounts to a condition precedent which must be fulfilled. There can be no doubt that any condition precedent to the liability of a surety must be fulfilled, before recourse may be had against him .... "

The contention of Mr.Jani is that respondent No.1 (one of the guarantors) must either expressly or impliedly stipulate that the other surety also must sign, which would be a condition precedent and unless that condition precedent is fulfilled, he would not be liable, but, in the instant case, in my opinion, it can be said that he has proved impliedly that he would not be liable unless the document is signed by the other guarantor. In fact, the application is signed by both of them. Clause No.7 enables the petitioner-Bank to recover the amount from any of them and it is at the stage of Lavad Suit that one of them was held to be discharged. Obviously, in these circumstances, the Tribunal was right in invoking the provisions of Section 144 of the Act and such a view cannot be said to be illegal, arbitrary or unreasonable. In fact, it is based on equitable principle, which does not require interference.

For the foregoing reasons, in my opinion, no case has been made out and the petition deserves to be dismissed and it is accordingly dismissed. Notice is discharged. In the facts and circumstances, no order as to costs.

1st May, 2000 (C.K. Thakkar, J.)

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(apj)